

**FLATHEAD COUNTY BOARD OF ADJUSTMENT
MINUTES OF THE MEETING
AUGUST 06, 2019**

CALL TO ORDER
6:01 PM

A meeting of the Flathead County Board of Adjustment was called to order at approximately 6:16 p.m. at the South Campus Building, 40 11th Street West, Suite 200, Kalispell, Montana. Board members present were Ole Netteberg, Gina Klempel, Roger Noble, Cal Dyck, and Tobias Liechti. Mark Mussman represented the Flathead County Planning & Zoning Office.

There were 6 members of the public in attendance.

**APPROVAL OF
MINUTES**
6:01 PM

Klempel motioned, seconded by Netteberg, to approve the July 02, 2019 minutes as written.

The motion passed on a 3-0 roll call vote. Noble and Dyck abstained.

PUBLIC COMMENT
(Public matters that are
within the jurisdiction of
the Board 2-3-103 M.C.A)
6:02 PM

None

**DISCLOSURE OF
CONFLICT OF
INTERESTS**
6:02 PM

None

**PING SHORT TERM
RENTAL APPEAL**
(APPEAL-19-02)
6:02 PM

An appeal by Warren et al regarding a decision made by the Zoning Administrator determining that an Administrative Conditional Use Permit (FACU-19-10) for Ping Construction Inc. (Scott Ping) granted May 2, 2019 for short-term rental housing did not take into account all the pertinent factors related to the decision. The property is located at 650 Walker Meadow Road within the S.E. Rural Whitefish Zoning District, zoned SAG-10 (Agricultural), and contains approximately 14.6 acres.

BOARD DISCUSSION
6:03 PM

Mussman addressed the board and informed them that Devlyn Warren, the appellant, notified the Planning Office at approximately 5:00 pm that he would not be able to make it due to some unforeseen circumstances. Mussman said the board had options as to how to move forward. It was decided that they would try to conference in the appellant via phone in order to move forward with appeal.

**APPLICANT
PRESENTATION
6:06 PM**

Devlyn Warren, 880 Monegan Rd., was the appellant in this case and was able to join the meeting via the conference phone. He apologized for not being there in person due to a flight cancellation. He explained the reasons behind the appeal. Contrary to the staff's interpretations, he felt there were issues and conditions that could not be mediated and proceeded to give examples. He felt the landowner, Scott Ping, had a history of not being forthcoming. He brought up Ping had continued to rent out a VRBO after saying he would not and had not paid his bed tax on it. He stated Ping had a history of not following the rules (i.e. locking the neighbors off their properties, not honoring easements, and more). He felt it was the board's obligation to look at the historical performance and question if there was a likelihood that the permit would not be conformed to in order to protect the concerned neighbors against the situation.

Warren had walked over to the property and looked at the proposed site plan. What had been staked out for the building on the property appeared to look different than the site plan which had been submitted. He said the site plan showed that the building would actually be in a creek bed.

There had been a lot of confusion around the short term rental. Warren had presented proof that Ping currently had two rental units and now wanted to add another house. Warren expressed that people in that area had bought there due to the zoning protection in place and he implored the board to honor that.

**STAFF REBUTTAL
6:14 PM**

Mussman reviewed his report which had been submitted to the board prior to the meeting. He reviewed the history of the conditional use permit in question and how it had been processed. He also outlined the public comments received and why those comments were not applicable to the review criteria or had been mitigated by the conditions of approval. He said, as part of the Flathead Administrative Condition Use Permit (FACU) process, the notice of application was mailed out to property owners within 150' of the subject property boundaries only, however, any written opposition received had been noted. He read the regulations regarding written opposition and how it was processed during an administrative conditional use permit review. The comments and concerns, he felt, were addressed and mitigated through the conditions of approval.

He addressed the camp and retreat center application last year vs. the application for a short term rental in which Ping wanted to build for his daughter and rent out when she was not there. He noted that it had not been built yet because they were still involved with Environmental Health as well as a rewrite for COSA.

He also addressed that any uncollected past accommodation taxes was a matter for the Department of Revenue.

Mussman offered to review the criteria for conditional use permits but mentioned what was not included was the history of the property owner.

He also disagreed that the site plan showed the cabin to be in the creek bed. The site plan showed the cabin to be outside of the floodplain hazard zone

He clarified that a variance was not requested; it was a FACU for a short term rental house.

BOARD DISCUSSION
6:19 PM

Noble asked for clarification on the site plan received during the application process. Mussman said it had not been developed yet so he did not know the exact location but it would be included in the conditions of approval. They proceeded to discuss the process of closing out a file and checking the conditions of approval. There would be a site visit (i.e. the structure would have to be built above the bank of Walker Creek, they would need a copy of the accommodation license and other conditions of approval, and emergency contact information would need to be sent via certified mail to the adjoining property owners).

PUBLIC COMMENT
6:24 PM

Thane Johnson with Johnson, Berg, McEvoy & Bostock, PLLP, 221 1st Ave E, was the legal representative for Scott Ping, the property owner. He showed the board a set of proposed plans for the guest house and felt it was tasteful and would look nice on the property. He was in agreement with the director and his interpretation. He had looked in to the regulations and addressed some of the concerns that had previously been brought up (i.e. traffic). Traffic would not be significant as the property was for his daughter. Requirements had been met. He said if Mr. Ping were to be in the middle of a litigation, it was irrelevant to this case. He addressed the accusations of already having rentals on the property and stated there was currently a residential home, a caretaker's home, and potentially this next home.

Scott Ping, 650 Walker Meadow Rd., was the property owner of the subject property. He was unaware of being presently involved in a lawsuit. He said this was typical of the neighbor; trying to derail what he had the legal right to do with his property. He said everything the director had said was true and valid. He was not a part time resident and had been there for 40 years. He felt it was too bad that [the area] wasn't like it used to be. He said the appellant had called him a liar but did not know him personally. Ping had contacted the neighbors

and was willing to show them the site plan first-hand. He did not receive any responses. He had tried to contact Warren to settle issues but Warren refused to talk to him. He felt he was not able to mediate any complaints until it went through Planning and Zoning. He was within his rights to proceed with this proposal. He was appalled that his neighbors wouldn't just come and talk to him and felt like he jumped through a lot of hoops. There had been a lot of gossip and hearsay; making him defend himself and what he wanted to do with his property. He felt he was a man of his word despite what the appellant thought.

Nathan Conaway, 650 Unit B Walker Meadow Rd., was the caretaker living on the property. He described the property and stated it was a cool opportunity for the daughter as well as people who wanted to come for the "Montana Experience".

Hal Trost, 240 Sweetgrass Way, spoke in opposition of the short-term rental and support of the appeal. Walker Creek separated his property from Ping's property. He had bought the property from Ping and explained the COSA was to be used for 2 single property dwellings. He said when he bought the property there were strict covenants put on him but he was frustrated that Ping seemed to be able to do whatever he wanted to do with his property without the restrictions. He was concerned about the negative impacts that could occur with short-term rentals. He said the other thing he was frustrated with was that Walker Creek was his property line and Ping had taken an acre of his property. He said the road did not affect him but expressed that other neighbors were concerned about sharing a road and the easement. He also questioned the exact location of the building and felt the site plan was inaccurate. He expressed frustration that the barn was still being rented from under the table.

Dwayne Becker, 1025 Monegan Rd., spoke in opposition of the short-term rental. He felt Ping was not trustworthy and has had incidents involving Ping in previous years. He said his daughter had yet to move into any of the properties built. He accused Ping of not being a good neighbor and felt he was not trustworthy based on previous encounters he has had.

APPELLANT REBUTTAL
6:46 PM

Warren addressed the attorney's comment regarding the road being paved but clarified that it was only paved to Ping's house and was gravel afterwards. The people using the new building would be using part of the gravel road and this would affect his personal property.

He addressed a number of complaints against Ping. He said Ping hosted late

night parties already. He had previously advertised there were two units in the barn. There was a history of noise complaints. There was history of Ping not taking care of his animals. The animals had been left out. Ping had accused Warren of letting them out but he was actually out of the state at the time. He said these complaints were before him [living in the area] and all of his neighbors had spoke out against him. He said it was not hearsay when the neighbors had experienced it.

He also clarified that he was not from Texas as mentioned prior. He was from Colorado and was a farmer by trade. He said the reason why Ping was not interacting with his neighbors directly was because they were scared of him due to his behavior. He had experiences with Ping locking him out of his own property. He said he was representing everyone on the petition that were not in favor of this. He hoped the board would hear and honor the things that were being said this evening. He asked they protect their rights.

**HOME OWNER
REBUTTAL
6:52 PM**

Ping said there had been a lot of mistruths spoken and was sorry that it had come down to hearsay and that [the neighbors] did not want him to but he had a right to [do this on his property]. He said he had gone through all the hoops and was sorry that [Warren] did not like him. Nobody had come to him to look at [the site] because they were scared of him. He found it disturbing that a man could live on a piece of property, as long as he had, and not be able to do what he wanted to do on the property, even by going through the legal ramifications and following the rules. He hoped that the board would “do the right thing”.

**BOARD QUESTIONS
6:53 PM**

Netteberg asked Ping if there would be an additional VRBO in the barn in addition to the building which the permit would apply to. Ping said no. He said he was following the zoning accordingly.

Klempel asked if he lived on the property. Ping said he had for the last 40 years. She asked if this was his place of residence. He said yes. She asked what the square footage was of the proposed house and Ping replied about 1750 sq ft. Klempel asked if the caretaker lived on the property. Ping replied that he did. Klempel asked how the horses got out. Ping said somebody had left the gate open; it wasn't him or the caretaker. Warren had said it wasn't him. He said it had happen twice. Klempel asked if he could lock the gate and also wanted clarification that there were actually 2 gates. Ping said there was only one now but there had been two. If one was unlocked, then the other one was unlocked as well and the horses could just push through it. He had put up a sign that said “Please keep the gate closed”. According to Ping, two days later, he saw Warren drive down there and unlock the gate. He acknowledged there was a dispute. Maybe Warren and the other neighbors did not like him but it did not

give them the right to let his horses out or to spread lies.

Netteberg asked if there was an easement that the neighbors were driving through. Ping said that there was an easement through his property that led to the back of their property but they also had a main entrance through a different road.

Dyck asked Mussman about the 15 conditions of approval and if the conditions could be changed, adjusted, or if it was all that they had to work with. Mussman replied it depended on the extent of the modification. Noble felt modifications should be allowed if it was consistent with the staff report and findings. Mussman said there needed to be a connection to the findings of fact in order to add or modify conditions. If that were not the case, he would caution against it.

Noble asked Mussman for clarification regarding the guest house use. He asked if his daughter were to stay there, was there a limitation of the duration. Mussman said a guest house was a dwelling unit accessory to the principle single family dwelling that cannot exceed two bedrooms in size and designed for guests. If there were no plans to short term rent this guest house, then it would have been a permitted use within the SAG-10 zone and would not be here. The request was to utilize the guest house and have it approved for short term rentals when it was not in use for family and closer guests.

Klempel asked if an Accessory Dwelling Unit (ADU) had to be connected to the main dwelling. Mussman replied that it could be. He explained that an ADU was a different permitted use in the SAG-10 as well. It could either be attached or detached but needed to be less than 45% of the size of the principle dwelling.

Dyck asked if the ADU met the criteria. Mussman said the subject building was a guest house and was already a permitted use; as well as the existing caretaker's facility was a permitted use. He outlined the permitted uses in SAG-10 zones.

**MOTION TO DENY
APPEAL-19-02
7:03 PM**

Noble made a motion, seconded by Netteberg, to deny APPEAL-19-02.

BOARD DISCUSSION
7:03 PM

Noble made the motion to deny the appeal and said that he felt the director had done a good job of addressing the concerns and issues brought up in appeal. He felt some of the issues were beyond the control of the board or department's jurisdiction. They were civil concerns that should be brought up in a different venue. He did several suggested conditions that he wanted to add including:

Condition #16 that the applicant provide a rewrite of existing COSA EQ#00-1284 to obtain an amendment from DEQ and the Flathead County Health Department for:

- 1) a guest house use
- 2) a shared well use
- 3) sanitary sewer
- 4) non-degradation analysis
- 5) road access
- 6) storm water.

Noble said those were standard things in a COSA rewrite. Mussman said it was a good condition but he would question the necessity for a couple of different reasons being that he would not be able to get a public accommodation license unless he did that. The public accommodation license was already part of the condition of approval. He also pointed out that condition #5 stated that the applicant shall obtain an approved septic system permit through the Environmental Health Department. Noble said it was not a re-write and was a different "animal". Mussman said condition #9 required the public accommodation license. Mussman felt that the conditions were already covered, as well conditions that needed to be met through the Environmental Health approval process. Upon hearing this, Noble was satisfied that the issues were being addressed.

Noble requested that the architect site development plan, which had been submitted during the meeting, be conditioned to be built as such. Mussman decided to add a condition of approval to state:

- The guest house shall be in substantial compliance with the exhibits submitted at the BOA hearing on August 6, 2019.

Klempel asked if there could be a cattle guard put in. Ping said there was a dispute over the easement but he had already secured the gates which they were escaping from. Mussman said the livestock issue was not relevant to this permit, as cattle was a permitted use. Klempel understood it could not be policed but wanted to find resolve for the issues of the animals getting out. It was a safety issue. Mussman said it would be a problem no matter what type of

dwellings were on the property. Klempel understood what was being said but felt, with a proposed guest house, there could be more of that happening where people are leaving gates open and animals are getting out. Mussman said that it could be addressed outside of this hearing.

**ROLL CALL TO DENY
APPEAL-19-02
7:12 PM**

The motion passed unanimously on a roll call vote.

**STAFF ADDRESSES THE
APPELLANT
7:13 PM**

Mussman notified Warren that if he was not happy with the decision made by the BOA, he had 30 days to appeal to a circuit court. If he wanted to take it that far, that was the next option.

**OLD BUSINESS
7:13 PM**

None

**NEW BUSINESS
7:13 PM**

None

**ADJOURNMENT
7:13 PM**

The meeting was adjourned at approximately 7:13 pm on a motion by Noble and seconded by Klempel.



Cal Dyck, Chairman



Angela Phillips, Recording Secretary

APPROVED AS SUBMITTED/CORRECTED 10/01/2019